Filed 8/30/06 In re Tiffany S. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re TIFFANY S., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. TRACY O., Defendant and Appellant.	E040178 (Super.Ct.No. RIJ110623) OPINION

APPEAL from the Superior Court of Riverside County. Elva R. Soper, Judge. (Retired judge of the L.A. Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed with directions.

Laura L. Furness, under appointment by the Court of Appeal, for Defendant and Appellant.

Joe S. Rank, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

Sharon S. Rollo, under appointment by the Court of Appeal, for Minor.

Appellant Tracy O. (mother) appeals from the juvenile court's decision to terminate her parental rights to Tiffany S. (minor) pursuant to Welfare and Institutions Code section 366.26.[1] Specifically, mother contends: (1) the juvenile court abused its discretion when it denied her oral motion to continue the section 366.26 hearing so she could file a section 388 petition alleging changed circumstances; and (2) the juvenile court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA). (25 U.S.C.A. § 1901 et seq.)

FACTS AND PROCEDURE

On the night of September 1, 2005, mother and the minor's father rushed the five-month-old minor to the hospital because she had been crying, she was arching her back, and her head was "bobbling." The minor tested positive for methamphetamines and amphetamines. The minor also had abrasions on her corneas, likely caused by debris such as sand getting into her eyes, as well as a massive sepsis infection throughout her body.

Mother admitted to being a regular user of methamphetamine for about 11 years. She stated that she had used drugs about 8:00 p.m. on September 1, 2005, and that the minor's father had used drugs about 10:30 p.m. Both parents said that when they used

[1] All further section references are to the Welfare and Institutions Code unless otherwise indicated.

drugs at their home, they would take turns watching the minor while the other did drugs. Mother could not explain how the minor had ingested methamphetamines. Mother was arrested for child endangerment (Pen. Code, § 273a, subd. (a)) and the father was arrested for child endangerment and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). Mother remained in custody through the section 366.26 hearing, with a release date in May 2006, and was present, in custody, at all hearings.

On September 2, 2005, mother, the maternal grandmother, and the father told the social worker that they had no knowledge of any Indian heritage in the minor's family. However, on September 8, 2005, a Parental Notification of Indian Status form[2] was filed with the juvenile court, on which mother indicated she might be a member of the Cherokee Indian tribe. A JV-130 form was also filed with the court on behalf of the minor's father, but none of the boxes on the form were checked. The boxes were to have indicated whether the minor did, might, or did not, to the father's knowledge, have Indian ancestry.

The section 300 petition alleged that the parents had inflicted serious physical harm on the minor (§ 300, subd. (a)), had failed to protect her (§ 300, subd. (b)), and had made no provision for her support because they were incarcerated (§ 300, subd. (g)). At the September 8, 2005, detention hearing, the juvenile court found a substantial danger to the physical health of the minor and her 11-year-old half sister, and removed them from

[2] Judicial Counsel form JV-130.

their parent's physical custody pursuant to section 319, subdivision (b)(1).[3] The juvenile court ordered reunification services for mother pending the next hearing.

At a hearing on September 29, 2005, the juvenile court warned mother that because she would be in jail until May 2006, she would have trouble completing her case plan within the six-month time limitation for reunifying with the minor. Both the parties and the juvenile court were uncertain what services would be available to mother at the Banning jail, and for which of those services she would be eligible. On October 14, 2005, the minor was placed with the maternal aunt and uncle.

At the November 2, 2005, jurisdiction hearing, the juvenile court found the allegations in the petition to be true. The court also concluded that because mother would be beyond the six-month deadline for reunification by the time she was released in May 2006, it would not be in the minor's best interest to provide mother with reunification services. (§ 361.5, subd. (e)(1).) The juvenile court set a section 366.26 selection and implementation hearing for March 2, 2006. The court also advised mother that "if there was some miracle," and she was able to complete reunification services prior to the section 366.26 hearing, she could file a section 388 petition prior to that hearing.

At the section 366.26 hearing actually held on March 27, 2006, the juvenile court terminated mother's parental rights to the minor and selected adoption as the permanent plan, with preference to be given to the maternal aunt and uncle. The juvenile court also

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[3] The minor's half sister was placed with her father and is not the subject of this appeal.

denied mother's oral motion to continue the hearing for six weeks so she could file a petition showing changed circumstances under section 388.

DISCUSSION

1. *Motion to Continue Section 366.26 Hearing*

Mother argues the juvenile court abused its discretion when it denied her oral motion to continue the section 366.26 hearing for six weeks, to May 8, 2006, so she could file a section 388[4] petition showing changed circumstances after being released from custody on May 6, 2006.

"Upon request of counsel for the parent, . . . the court may continue any hearing under this chapter beyond the time limit within which the hearing is otherwise required to be held, provided that no continuance shall be granted that is contrary to the interest of the minor. In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements. [¶] Continuances shall be granted only upon a showing of good cause and only for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance." (§ 352, subd. (a).)

Section 352, subdivision (a), also provides: "In order to obtain a motion for a continuance of the hearing, written notice shall be filed at least two court days prior to the

[4] A section 388 petition is filed to request to change, modify, or set aside any previously made order. It is unclear from the record whether mother wanted to file the petition to request reunification services or to ultimately regain custody of the minor.

date set for hearing, together with affidavits or declarations detailing specific facts showing that a continuance is necessary, unless the court for good cause entertains an oral motion for continuance."

As the section indicates, the granting of a continuance is discretionary and the juvenile court's order denying a continuance is reviewed for abuse of discretion. (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 810.) "A continuance shall be granted only on a showing of good cause and shall not be granted if it is contrary to the minor's best interests. [Citation.] In considering a request for a continuance, the court must 'give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements.' [Citation.]" (*In re J. I.* (2003) 108 Cal.App.4th 903, 912.)

Here, mother's counsel told the juvenile court that she had completed 28 hours of parenting classes, in custody, and was involved in counseling, anger management, and domestic violence prevention classes. Mother's counsel also represented that upon her release from custody on May 6, 2006, mother had a bed waiting for her at a drug treatment program where she could have the minor live with her. Mother's counsel argued that she should be given an opportunity to reunify with the minor after her release from custody and that she would file a section 388 petition asking to regain custody if the hearing were postponed to May 8, 2006.

We cannot conclude that the juvenile court abused its discretion when it denied the motion to continue for lack of good cause. First, mother had ample time prior to the

section 366.26 hearing to file the section 388 petition, but failed to do so, thus further postponing permanency for the minor should the court have decided to grant the petition. Second, while mother's offer of proof was that she had completed 28 hours of parenting classes, along with counseling, anger management, and domestic violence prevention classes, she had not demonstrated, and could not demonstrate, a sustained period of sobriety other than that imposed by being kept in custody, and this after an admitted 11-year history of drug use. Third, mother had not been able to have visits with the then 11-month-old minor for the previous six months and the social worker's report indicated that the minor was well-bonded with the maternal aunt and uncle; thus, mother would have had a difficult time showing that any change in the court's orders would be in the minor's best interest, especially given that mother had negligently allowed the minor to ingest amphetamines and methamphetamines.

Finally, a section 388 petition filed on the requested date of May 8, 2006, could not be successful in establishing changed circumstances. This is because, at that time, mother would have been out of custody only two days, and would not have yet been able to show that she could live free of drugs and provide the minor with a safe home. Any realistic chance for a section 388 petition to succeed would have, in practice, required a continuance of at least several months beyond that requested in the motion, even further postponing permanence for the minor. Thus, the juvenile court did not abuse its discretion when it found that mother did not show good cause to continue the section 366.26 hearing.

2. *ICWA*

Mother also argues that the juvenile court failed to comply with the notice provisions of ICWA after mother completed a JV-130 form indicating the minor might be an Indian child.

"In general, the ICWA applies to any state court proceeding involving the foster care or adoptive placement of, or the termination of parental rights to, an Indian child. (25 U.S.C. §§ 1903(1), 1911(a)-(c), 1912-1921.) 'Indian child' is defined as a child who is either (1) 'a member of an Indian tribe' or (2) 'eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe . . . .' (25 U.S.C. § 1903(4).) 'Indian tribe' is defined so as to include only federally recognized Indian tribes. (25 U.S.C. § 1903(8).)

"Concerning notice, the ICWA provides: '[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify . . . the Indian child's tribe [or the Bureau of Indian Affairs (BIA)], by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. . . . No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by . . . the tribe or the [BIA] . . . .' [Citations.]" (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 338.)

"The Indian status of the child need not be certain in order to trigger notice. [Citation.]" (*In re Gerardo A.* (2004) 119 Cal.App.4th 988, 994.) "[O]ne of the purposes

of ICWA notice is to enable the tribe or BIA to investigate and determine whether the minor is an 'Indian child.' [Citation.]" (*Id*. at p. 995.)

Here, the juvenile court's duty to ensure that the Department of Public Social Services (department) complied with the ICWA notification provisions arose when it knew or had reason to know that the minor might be an Indian child. The court had reason to know the minor might be an Indian child as of September 8, 2005, the date that mother's attorney filed the JV-130 form. This form informed the juvenile court that mother may be a member of the Cherokee Indian tribe and thereby triggered the court's duty to ensure that the department complied with the notice requirements of ICWA.

The department argues that the juvenile court was entitled to rely on the conflicting evidence in the record, namely that mother and others had initially told the social worker that the minor had no Indian heritage. This information was repeated in the Jurisdiction/Disposition Report filed on September 27, 2005, and the section 366.26 hearing report also stated that ICWA did not apply. However, the department does not cite any case law specifically supporting its argument that a juvenile court can choose to ignore information in the record, in the form of a duly filed JV-130 form, that indicates a child may be an Indian child.

"Since the failure to give proper notice . . . forecloses participation by [interested Indian tribes, the ICWA] notice requirements are strictly construed. (In re *Desiree F*. [(2000)] 83 Cal.App.4th [460,] 474-475.) . . . Courts have held that without discharging their duty to provide the notice required under the ICWA, state courts do not have jurisdiction to proceed with the dependency proceedings. [Citations.] Thus the failure to

provide proper notice is prejudicial error requiring reversal and remand. [Citations.]" (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.) Thus, because the juvenile court's duty to ensure ICWA notice compliance was triggered when mother filed the JV-130 form indicating she may have Indian heritage, we must reverse the judgment here and direct the trial court to make sure the department fully complies with the ICWA notice requirements.

DISPOSITION

The judgment terminating parental rights is reversed, and the case is remanded to the juvenile court with directions to order the department to comply with the notice provisions of ICWA and to file all required documentation with the juvenile court for the court's inspection. If, after proper notice, a tribe claims the minor is an Indian child, the juvenile court shall proceed in conformity with all provisions of ICWA. If, on the other hand, no tribe claims that the minor is an Indian child, the judgment terminating parental rights shall be reinstated.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.